THE LEX MERCATORIA AS APPLICABLE LAW

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Acronym dictionary

Transnational corporations - TNCs

Multinational corporations - MNCs

Organization for Economic Cooperation and Development - OECD

United Nations Centre on Transnational Corporations - UNCTC

International Institute for the Unification of Private Law - UNIDROIT

International Commercial Terms - INCOTERMS

Uniform Customs and Practice for Documentary Credits - UCPs

Lex Mercatoria - LM

Introduction

Nowadays, the International commercial transactions have become a regular activity of many businesses in today's globalized economy, and that's why, with the increasing complexity of international trade, the regulation of such transactions has become more and more important. The traditional sources of international law, such as treaties and conventions, have become inadequate, in some cases, to satisfy the needs of international commercial transactions. As a result of this, a body of international commercial laws known as the lex mercatoria (hereafter, LM) has emerged as another source of law in national legal systems, whose relationship with the national system I will analyze in brief.

We can define the LM as a collection of customs, practices, and rules that have evolved through international trade and have gained recognition as a source of law for international commercial transactions. The LM, is characterized by not being codified in any single document, being the result of the principles and practices that have been developed through the practical application of international commercial law. [1]

The applicability of the LM has been the subject of ongoing debate among scholars, with some arguing for its use as a tool to regulate international trade, while others have been more critical of its role in international law.

In this study, I will focus specifically on the applicability of the lex mercatoria in national legislation so, the primary objective of this study is to examine if the LM has been integrated into national legal systems and how it has been integrated.

To achieve this objective, I will use literature available through the national library network and the internet, as well as my own knowledge, to analyze the current situation of international law and policy. I will examine the relationship between the LM and national legal systems, including the challenges and opportunities presented by its use in practice.

Overall, my study aims to contribute to a better understanding of the role that the lex mercatoria can play in the regulation of international trade within the context of national legal systems. By analyzing its current application and its potential future development, I hope to provide insights that can inform the ongoing debate about the role of the LM in international commercial law.

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[1] GOODE, Roy; KRONKE, Herbert; MCKENDRICK, Ewan. P. 06; 35; 38

Basic concepts

Transnational corporations

Transnational corporations or TNCs, are defined by the OECD and the UNCTC as large companies that operate in multiple countries, with headquarters in one country and operations and investments in others. As a result of this, we can distinguish TNCs from other types of corporations with their ability to operate across countries and manage, control, and develop strategies across and above national frontiers[2], operating direct business activities in at least two different countries.[3] This means that they establish affiliates or own assets located abroad, giving them a global reach that other corporations do not have.

However, despite their significant impact on the global economy, TNCs are not considered legal entities in international law in the same way that states do, even if they have significant influence over the international decision-making process, they are not considered as actors in the international sense because of their lack of legal personality. Thus, their economic power and their ability to mobilize resources and shape public opinion in multiple countries make them important actors in international relations which have the ability to impact global issues such as human rights, environmental protection, and economic development.[4]

Moreover, TNCs often operate in countries with weaker regulatory frameworks, which can create challenges for local communities and governments. They have been criticized for engaging in unethical practices such as labor exploitation, environmental degradation, and tax avoidance. Due to their global reach and economic power, they have the ability to influence local politics and shape national policy agendas, often to their advantage.[5] [6]

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[2] Dunning, John H. *Multinational enterprises and the global economy*. Harlow, England etc. : Addison-wesley, 1992. P 3

[3] Dunning, John H. *Multinational enterprises and the global economy*. Harlow, England etc. : Addison-wesley, 1992. P 4 and 10-11

[4] Dunning, John H. *Multinational enterprises and the global economy*. Harlow, England etc. : Addison-wesley, 1992. P 6-9

[5] Dunning, John H. *Multinational enterprises and the global economy*. Harlow, England etc. : Addison-wesley, 1992. P 545-588

[6] Acosta Estevez, Jose Benito. *Organizaciones Internacionales y Relaciones Internacionales*, s.d.

In conclusion, TNCs are large companies that operate across multiple countries, with significant influence over the global economy and international decision-making process. While they are not legal entities in the same way that states are, they have become important actors in international relations and have the ability to impact global issues. However, their operations can also create challenges for local communities and governments [7] [8] since their cross-border activities, makes them linked with multiple legal orders so different laws could apply to those activities. In light of this, TNCs might be the ones more interested in being submitted to the LM as this would make it easier for them to know the rules applicable to their international business operations.

Lex mercatoria

As mentioned in the introduction, LM, also known as the law merchant or merchant law, is a body of customary commercial law that has evolved over centuries to govern international trade and commerce. Its origins can be traced back to the medieval period, particularly in Florence during the 15th century, where traders from different countries created their own systems of commercial law to govern their transactions in the absence of adequate state legislation for their activity. These practices and customs were later codified and incorporated into the legal systems of different countries and recognized as a separate body of law applicable to international trade.[9]

Today, LM or new lex mercatoria is understood as a phenomenon that arises with the same intention as the classical LM, that is, to provide an adequate regulation to the practice of

[7] Letto-Gillies, Grazia. *Transnational corporations and international production: concepts, theories, and effects*, 2005.

[8] Dunning, John H. *Multinational enterprises and the global economy*. Harlow, England etc. : Addison-wesley, 1992.

[9] VÉSELA, ANDREEVA. «DERECHO INTERNACIONAL PRIVADO: OBJETO, CONCEPTO Y CONTENIDO DEL DIRPR», 2021. P 8

international trade.[10] [11] This new LM is built on commercial relationships and has a legal and binding character, even if its provisions are not rigid. It is based on customary norms and aims to offer the same certainty, predictability, and effectiveness as a positive rule, even when it is not created through a state legislative process and induced with the formalities and guarantees that these enjoy. The LM may even replace conflict rules applicable in certain areas, provided that their provisions have been freely agreed upon by the parties. However, if there are any gaps in these provisions, the rules of conflict will be used to supplement and complete them.[12]

Its application is generally associated with the arbitration procedure being a more controversial issue, its application by national courts.[13] Its use usually represents an alternative to the practical problems resulting from the application of the conflict of law rule, seeking to provide a jurisdiction more suited to the needs of commerce, covering topics such as contracts, commercial documents, carriage of goods, banking and finance, and dispute resolution.An example of its capacity to solve the problems resulting from the application of the conflict of law rule is the TJUE's dictate in the "Eelectrosteel" case.[14] [15] In this case, the court established that from now on, courts of the EU Member States will no longer have to use their rules of private international law in distance purchase contracts. Instead, to determine the law applicable to the contract -including delimiting the place of delivery of the goods in such a contract and

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[10] Goldman, supra n 11, 244 (defining lex mercatoria as "transnational principles, rules and usages" which are not enacted by the state but "formed spontaneously in the course of the functioning of these [international economic relations]") (translation by the author); Schmitthoff, International Business Law: A New Law Merchant, Current Law and Social Problems, 1961, supra n 11, 5 (referring to transnational law as "an autonomous law of international trade, founded on universally accepted standards of business conduct").

[11] Petsche, Markus. «The Application of Transnational Law (*Lex Mercatoria*) by Domestic Courts». *Journal of Private International Law* 10, núm. 3 (31 desembre 2014): 489-515. P 5. https://doi.org/10.5235/17441048.10.3.489.

[12] As is said by ESTEBAN DE LA ROSA, F., "Nuevos avances...", loc.cit., p. Y DE MIGUEL ASENSIO, P.A., "La Sentencia del Tribunal de Justicia en el Asunto Car Trim", at: http://pedrodemiguelasensio.blogspot.com/2010/03/la-sentencia-del-tribunal-de-justicia.html

[13] Tamanaha, B. Z. "The rule of law". P 12.

[14] Judgment of June 9th of 2011, case C-87/10, "Electrosteel".

[15] Vid. PIRODDI, P., "Incoterms e luogo di consegna dei beni nel Regolamento Bruxelles I", Riv. Dir.int.pri.pro., No 4, 2011. P 939-970.

establishing the place of delivery of the goods in distance purchase contracts- they should attend to the contract and all its clauses, including those that integrate LM or INCOTERMS. [16]

Regarding its normative content, there are different opinions. Generally, the doctrine considers that commercial practices, arbitral jurisprudence, standardized usages and clauses, the work of experts in international organizations, professional guidelines, and codes of conduct should be considered sources of lex mercatoria.[17] There is also another trend that includes international treaties[18] or references to the general principles of law[19] or specific instruments such as the UNIDROIT Principles, INCOTERMS, UCPs, UNCITRAL model laws[20], and the European Principles of Contract Law. However, there are also those who deny the source character of treaties [21]

Nevertheless, it seems more appropriate to limit the scope of what is understood as lex mercatoria to those customary practices that are part of the intended transnational commercial law[22], as the other approaches make little distinction between the different sources and their conceptual differences. Thus, for example, by subjecting customary practices, contractual models, private codifications, and general principles to the same approach, different phenomena are given a uniform treatment which would be wrong by its nature.[23]

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[16] Elósegui, Nerea Magallón. «NUEVAS PAUTAS DEL TJUE PARA LA IDENTIFICACIÓN DEL LUGAR DE ENTREGA DE LAS MERCANCÍAS EN LAS COMPRAVENTAS INTERNACIONALES A DISTANCIA». *REVISTA ELECTRÓNICA DE ESTUDIOS INTERNACIONALES*, 2012. P 12

[17] BRITO, Maria Helena. P 119.

[18] CARDENA AFANADOR, Walter René. "Impacto en Colombia de la Lex mercatoria". Revista electrónica de difusión de la Universidad Sergio Arboleda. 2006, nº 11, P 1-21.

[19] FELDSTEIN DE CARDENAS, Sara. P 168-172.

[20] CARLINI, Gabriel A. El contrato de compraventa internacional de mercaderías. Buenos Aires: Ábaco, 2010. P 41-43.

[21] BRITO, Maria Helena. "Portugal". In: ESPLUGUES MOTA, Carlos; HARGAIN, Daniel; PALAO MORENO, Guillermo (eds.). Derecho de los contratos internacionales en Latinoamérica, Portugal y España. Madrid: Edisofer, 2008. P 674.

[22] GOODE, Roy; KRONKE, Herbert; MCKENDRICK, Ewan. P 06; 35; 38

[23] Brasil, i Frederico Glitz. «Lex Mercatoria: ¿Orden jurídico autónomo?». Centro Universitario de Curitiba, Brasil. Universidad Comunitaria de Chapecó (UNOCHAPECO), *Rev. secr. Trib.*

With that said and as a summary, the concept I will use throughout the entire work when referring to lex mercatoria is that it is an autonomous regulatory body independent of the legislative body of any state or supranational organization and therefore, it has its own legal character based on the usages and customs derived from international trade, despite having a dispositif nature.

The lex mercatoria as applicable law

Implications for national law of transnational legal pluralism

The concept of transnational legal pluralism has gained increasing attention in legal circles over the years. Transnational legal pluralism refers to the coexistence of multiple legal systems at different levels, including domestic legal systems, international law, and transnational law, such as the LM.[24]

The relationship between the LM and the State has been a topic of debate for some time now. One of the concerns raised is that the LM is not directly linked to any domestic legal systems and lacks a formal structure, which raises questions about how much it may be influenced by the interests of powerful actors in international trade. As a result of all this, national judges may find it challenging to apply it. However, despite this, the relationship between the State and the LM must be considered as symbiotic, and that's because the State cannot simply ignore its existence, and the Lex mercatoria cannot do without the State either.

In the current postmodern era, as noted by Alexandru Bostan[25], there has been a regression of sovereignty due to the rise of supranational law and the growing recognition of what is called "soft law."[26] These elements have contributed to the development of the LM, and the

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perm. revis. 5, núm. 9 (26 abril 2017): 196-223. https://doi.org/10.16890/rstpr.a5.n9.p196. P 210

[24] Cutler, C. "Legal Pluralism". P 724

[25] Bostan, Alexandru. «Transnational Law – a New System of Law?» *Juridical Tribune* 11, núm. special (30 octubre 2021). https://doi.org/10.24818/TBJ/2021/11/SP/05.

[26] Tai, Eric Tjong Tjin. "Global law for private law." Tilburg Law Review 17, no. 2 (2012). P 201.

implications for national law of transnational legal pluralism will vary depending on the acceptance given to it.

Calvo and Carrascosa present two different schools of thought regarding the acceptance of the Lex mercatoria[27]:

On one hand, the traditional acceptance conceives it as a set of customs, standard contracts, and rules of private associations that regulate some aspects of international contracting, not considering it as an independent legal system from national legal systems, as its existence is due to them. This point of view prevents the use of the LM as the applicable law to the contract, leaving to the conflict laws the determination of the applicable national law, following the conflict rule method created by Savigny in 1849. This method has been criticised as this does not always allow to designate the most appropriate material law to solve the case and that is why it has incorporated into it some rules for flexibility and correction[28] (escape clause [29] or mandatory rules[30]).

On the other hand, an advanced acceptance views the LM as a set of practices created by international traders and considers it a true legal system that competes with national laws and can regulate an international contract autonomously, without the involvement of state law. This point of view allows, and even aims for, the use of the LM as the applicable law to the contract, since it believes that the LM can provide a substantive response to the case without the use of conflict laws.

Regardless of the school of thought one subscribes to, it is a fact that the LM is an essential tool for the resolution of disputes by international arbitrators and, in some cases, by the national

[27] Calvo, L. A. & Carrascosa, J. (2006). Los contratos internacionales y el mito de la nueva lex mercatoria. Estudios sobre contratación internacional. Madrid: Colex.

[28] Pato, Alexia (2022). Derecho internacional privado II - Tema I: Métodos de reglamentación. Universidad de Girona (UdG)

[29] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (hereinafter the “Rome I Regulation” or the “Regulation”), Art 4(3).

[30] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (hereinafter the “Rome I Regulation” or the “Regulation”), Art 9(1).

jurisdiction because, as some authors point out, principles such as Pacta sunt servanda, rebus sic stantibus, culpa in contrahendo, good faith, and bribery as a cause of nullity or ineffectiveness of the contract, among others, have been listed as constitutive of the Lex mercatoria.[31]

However, the role of the state in terms of state, local, and even international regulation, either as a state or as part of a supranational organization, remains undeniable. The state determines the rules applicable in disputes before national courts, regardless of whether they are included in an international treaty or national legal system. Thus, while the LM may be an autonomous system of laws, it operates within a broader legal framework that includes the State's regulatory powers.

With this in mind, we can agree that the relationship between the LM and the State is complex, and the role of transnational legal pluralism in national law remains subject to debate. However, the Lex mercatoria is a vital tool in international trade, and its principles are widely recognized in resolving disputes. That is why organizations such as the European Union have given parties the option to choose this law as the applicable law in their contracts,[32] as I will explain later. By doing this,the LM provisions included in these contracts have been given the status of mandatory law. However, since the state or, in this case, the EU powers remain essential, the LM operates within this broader legal framework, and these provisions must meet the requirements contained in the same regulation.[33]

The application by national courts of the lex mercatoria

It is worth noting that currently there is no state or supra-state regulation that expressly establishes the obligation of national judges to apply LM. However, there are certain cases that could be considered exceptions to this statement and that I consider necessary to analyze.

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[31] Jaramillo, J. (1998). La lex mercatoria: mito o realidad. Negocios internacionales: tendencias, contratos e instrumentos. Tercer Congreso Iberoamericano de Derecho Empresarial. Bogotá.

[32] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (hereinafter the “Rome I Regulation” or the “Regulation”), Art 2.

[33] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (hereinafter the “Rome I Regulation” or the “Regulation”), Art 3(5).

The first case we find is that of the Inter-American Convention of 1994 - which never saw the light of day - and where two references could be found that would allow the application of contractual principles of lex mercatoria, in the absence of a more appropriate applicable national law:

> *"courts shall also take into account the general principles of international commercial law recognized by international organizations"*
> [34]

> *"the guidelines, customs, and principles of international commercial law as well as commercial usage and practices generally accepted shall apply"*[35]

However, the true implication of these references regarding LM is not clear since the formula used "general principles of international commercial law" allows for multiple interpretations given the lack of codification of the same, one of which would be to understand that this clause opens the door to the application of UNIDROIT principles. And likewise, if we adhere to a literal reading of the convention, this would only allow parties and courts to choose or apply national laws.

Another noteworthy case is that collected in article 7.2 of the United Nations Convention on Contracts for the International Sale of Goods (CISG):

> *"Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law."*[36]

This provision has been interpreted by some commentators[37] as allowing for the application of LM as a source of general principles in the absence of express provisions in the CISG.

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[34] 1994 Inter-American Convention, Art 9 (2)

[35] 1994 Inter-American Convention, Art 10.

[36] United Nations Convention on Contracts for the International Sale of Goods (CISG). Art 7(2)

[37] Petsche, Markus. «The Application of Transnational Law (*Lex Mercatoria*) by Domestic Courts». *Journal of Private International Law* 10, núm. 3 (31 desembre 2014): 489-515. https://doi.org/10.5235/17441048.10.3.489. P 496

Finally, we have the case of the Principles on Choice of Law in International Commercial Contracts from the Hague Conference on Private International Law, which provide in Article 3.3:

> *"the parties may choose as the law applicable to the contract a law other than the law of any State or country."*[38]

This provision has been interpreted by some[39] as allowing for the parties to choose the LM as the applicable law in their contract, which could then be recognized by national courts if the contract is subject to their jurisdiction.

However, as with the Inter-American Convention, the true implication of these provisions regarding LM is not clear and the lack of interpretation by any national court of these provisions makes it impossible to know the scope of these provisions and whether they would allow or not the application of lex mercatoria rules, what type of LM and above all, how it should be applied.

Finally, the Rome I Regulation[40] recognises the principle of party autonomy and let the parties chose the the law that is going to govern their contract[41]. In the absence of such a choice, Rome I, establishes a series of specific rules, depending on the characteristics of the transactions, and introduced some mentions that would affect the applicability of the lex mercatoria:

> "This Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention." [42]

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[38] Principles on Choice of Law in International Commercial Contracts. Art 3(3)

[39] Petsche, Markus. «The Application of Transnational Law (*Lex Mercatoria*) by Domestic Courts». *Journal of Private International Law* 10, núm. 3 (31 desembre 2014): 489-515. https://doi.org/10.5235/17441048.10.3.489. P 496

[40] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (hereinafter the "Rome I Regulation" or the "Regulation").

[41] Rome I Regulation., Art 3(1).

[42] Rome I Regulation, Recital 13.

> "Should the Community adopt, in an appropriate legal instrument, rules of substantive contract law, including standard terms and conditions, such instrument may provide that the parties may choose to apply those rules." [43]

> "With the exception of Article 7, this Regulation shall not prejudice the application of provisions of Community law which, in relation to particular matters, lay down conflict-of-law rules relating to contractual obligations." [44]

These would be able to let the parties incorporate a LM as contract terms in their contract, as the English courts said[45], and it would also give to other community instruments preference over Rome I[46]. But, can we really choose the lex mercatoria as tha applicable law? The answer, at least for the moment, it seems to be no[47] and the LM terms must be certain and unambiguous.[48]

So to conclude, I must emphasize that currently there is no clear regulation that establishes the obligation of national judges to apply lex mercatoria. The exceptions to this statement are not yet fully developed due to the characteristics of the LM, which make it difficult to use as applicable law., becoming necessary to regularize and even codify the LM to ensure that it complies with the requirements of a national legal system.

Lex mercatoria regularization: Global framework agreements and conventions

[43] Rome I Regulation. Recital 14.

[44] Rome I Regulation.Art 23

[45] English Court of Appeal, Shamil Bank of Bahrain v Beximco Pharmaceuticals [2004]

[46] Tang, Zheng Sophia. «Non-State Law in Party Autonomy â a European Perspective». *International Journal of Private Law* 5, núm. 1 (2012): 22. https://doi.org/10.1504/IJPL.2012.043899. P 7.

[47] H Heiss, 'Party autonomy' in F Ferrari, S Leible (eds) Rome I Regulation: The Law Applicable to Contractual Obligations in Europe (Sellier European Law Publisher, 2009). P 11.

[48] English Court of Appeal, Shamil Bank of Bahrain v Beximco Pharmaceuticals [2004]

After analyzing the concept of LM and mentioning various scenarios where there are controversies regarding whether national legislators allow for its pure application, we have seen that the question of the applicability of LM by national judicial bodies is at least complicated, if not impossible, due to the principles that govern these national judicial bodies, such as the principle of legal certainty. This principle translates into the individual having a reasonable certainty of the outcome of the trial, which can only be achieved if elements such as codification, transparency, and publicity of the judgments or coherence in rendering judgments without contradicting previous rulings are met[49].

Meeting these characteristics or requirements is difficult to achieve without carrying out a prior task of collecting the customs and practices of international trade. Therefore, it is essential to reference documents such as the UNIDROIT Principles[50], INCOTERMS[51], and UCPs[52] when discussing transnational regulation and global framework agreements. These documents are highly esteemed in the international legal community and serve as a foundation for comprehending and executing transnational regulation. They have been developed with input from the international community of entrepreneurs and legal experts and are regularly updated to reflect emerging practices in international commerce.[53]

While other important documents exist in the realm of international trade, such as the UNCITRAL model laws[54] and the European Principles of Contract Law[55]. They differ from the aforementioned documents in that they focus more on harmonizing and potentially replacing

[49] STC 24/2004, 4-II-2004: «El legislador debe hacer el máximo esfuerzo posible en la definición de los tipos penales, promulgando normas concretas, precisas, claras e inteligibles» .

[50] UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016

[51] ICC Guide on Transport and the Incoterms® 2010 Rules

[52]Uniform Customs and Practice for Documentary Credits (2007 Revision, ICC Publication No. 600).

[53] Cándano Pérez, Mabel. «La unificación del derecho comercial internacional: nueva lex mercatoria como alternativa al derecho estatal». *Prolegómenos* 21, núm. 41 (22 febrer 2018): 149-62. P 154 https://doi.org/10.18359/prole.3001.

[54] Volger, Helmut, ed. «UNCITRAL – United Nations Commission On International Trade Law». En *A Concise Encyclopedia of the United Nations*, 692-96. Brill | Nijhoff, 2010. https://doi.org/10.1163/ej.9789004180048.i-962.595.

[55] COMMUNICATION FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT ON EUROPEAN CONTRACT LAW. Brussels, 11.07.2001 COM(2001) 398 final

customs of the international business community with those that align more closely with certain political viewpoints. Consequently, these documents are more geared towards offering a new legal framework rather than capturing the customs and practices of international business.

Therefore, before concluding this work, I consider it necessary to analyze how the UNIDROIT Principles, INCOTERMS, and UCPs have facilitated the use of lex mercatoria as applicable law in trials carried out by national jurisdictions and international state courts. This analysis will provide insights into the practical implications of these documents in facilitating the application of transnational regulation and global framework agreements.

UNIDROIT Principles

The UNIDROIT Principles are what is commonly defined in international law as soft law, meaning quasi-legal instruments that are not legally binding in themselves due to their lack of normative rank, as the institutions that create them do not have legislative power[56]. However, they are recognized by a series of specialists in the field as customary in the daily practice of international trade, being therefore principles, customs, and ways of international trade also known as lex mercatoria.[57]

The UNIDROIT Principles provide a set of rules that can be applied to international commercial contracts where the parties have not chosen a specific governing law. These principles are widely accepted and can provide guidance to parties in the absence of a specific legal framework. They also recognize the customs and usages of international trade, and the parties are obligated by any usage that is widely known and regularly observed in international trade by the participants in the commercial transaction at hand, unless the application of such usage is unreasonable, as stated in article 1.9(2).[58]

Even if the parties do not agree to be bound by them, the judge considers them a relevant element for interpreting a certain provision or for filling a legal gap. Among the most applied

[56] Guarín, J. C. (2015). Principios UNIDROIT. Ratio Iuris, Revista de Derecho Privado, 3(1), 108-137.

[57] UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, Introduction.

[58] UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016. Art 1.9(2)

principles are those provided in articles 1.3 (mandatory nature of the agreement between the parties[59]), 4.1, 4.2 (interpretation of the written declaration of one of the parties as constituting notice of termination[60]), and 7 (right to terminate the contract[61]).

The contribution of arbitration to the formation and development of lex mercatoria is evident in different arbitral awards, which rely on previous judgments. Examples of such awards include cases 9593 and 7119 of the International Court of Arbitration[62], and the case processed by the Arbitral Tribunal in Milan, Italy, in 1996[63].

In 2010, the Constitutional Court of Colombia ruled in accordance with the UNIDROIT Principles. The case was a constitutional challenge against the first paragraph of article 1616 of the Civil Code of Colombia[64], where the Constitutional Court rejected the challenge. In doing so, the judges indicated that not only was the provision in question not irrational or arbitrary, but they were also inspired by basic criteria of contractual justice and equity, and they pointed out their conformity with important international instruments such as the Vienna Convention in its article 74 and the UNIDROIT Principles in its article 7.4.4.[65].

Based on this, the UNIDROIT Principles have been appreciated since their appearance as a significant step towards the modernization of contract law, representing a sort of private international codification of contracts. Therefore, they undoubtedly constitute an important

[59] UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016. Art 1.3

[60] UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016. Art 4

[61] UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016. Art 7

[62] Marella, F. & Gélinas, F. (1999). The UNIDROIT principles of international commercial contracts in ICC arbitration. ICC, International Court of Arbitration Bulletin, 10(2), 26-119.

[63] Oviedo, J. (2003). Aplicaciones de los principios de UNIDROIT a los contratos comerciales internacionales. Criterio Jurídico, 3, 7-33.

[64] Colombia, ed. Código civil. 8. ed. Colección Códigos básicos. Bogotá: Legis, 2002. Art 1616

[65] Guarín, J. C. (2015). Principios UNIDROIT. Ratio Iuris, Revista de Derecho Privado, 3(1), 108-137.

effort to harmonize and standardize the substantive law applicable to international commercial contracts.[66]

The UNIDROIT Principles did not arise with the intention of unifying the general law of contracts. However, national legislators take them into account because they provide a common language on contract law, leading to spontaneous harmonization of law and international legal evolution. Thus, the unification of international trade law has been favored by the emergence of this new lex mercatoria, as it is an autonomous, spontaneous, and uniform law of international trade that tends to naturally disconnect from any national legal system, creating effective legal uniformity, thereby attempting to provide a definitive solution to new conflicts in international trade.[67]

INCOTERMS

The Incoterms are a set of internationally applicable rules designed to facilitate the interpretation of commonly used international commercial terms[68]. The objective is to establish a set of international rules for the interpretation of commercial uses usually employed in

[66] Cándano Pérez, Mabel. «La unificación del derecho comercial internacional: nueva lex mercatoria como alternativa al derecho estatal». *Prolegómenos* 21, núm. 41 (22 febrer 2018): 149-62. https://doi.org/10.18359/prole.3001. P 159

[67] Cándano Pérez, Mabel. «La unificación del derecho comercial internacional: nueva lex mercatoria como alternativa al derecho estatal». *Prolegómenos* 21, núm. 41 (22 febrer 2018): 149-62. P 161 https://doi.org/10.18359/prole.3001.

[68] ALEJANDRO M. GARRO. "Rule-setting by private organizations, standardization of contracts, and the harmonization of international sales law", en IAN FLETCHER, LOUKAS MISTELIS, MARISE CREMONA (eds.). Foundations and Perspectives of International Trade Law, Londres, Sweet & Maxwell 2001. P 23.

international transactions. [69] The INCOTERMS aim to streamline the conclusion of the contract and avoid the risk of having divergent provisions between the parties' forms.[70]

In light of the above, it should be noted that the Incoterms are a reflection of the so-called Lex Mercatoria, since, as mentioned earlier, the Lex Mercatoria encompasses those customary practices that are part of the intended transnational commercial law.

In addition to being a manifestation of the Lex Mercatoria, the Incoterms are also considered as Soft Law instruments due to the systematization provided by the ICC. These do not have true normative force, as they have not arisen from a treaty between States, and their clauses are not incorporated into national laws by any normative act. Therefore, they cannot be considered legal norms since these terms were developed by a private organization, faithful to the characteristics of Soft Law instruments.

However, there are situations beyond cases where they are agreed upon by the parties, where they have binding force. Some examples of this, are the cases of the article 7 of the Commercial Code of Colombia, where it is reconized the binding nature of international commercial custom[71], or article 1-205 of the Uniform Commercial Code of USA[72].
Another examples, in the case of international sales, and in general of international contracts, are the article 9 of the 1980 Vienna Convention on the International Sale of Goods[73], where it is recognized not only the existence of such uses but also the mandatory nature of them.[74]

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[69] Fernández, Maximiliano Rodríguez. «LOS NUEVOS TÉRMINOS COMERCIALES INTERNACIONALES -INCOTERMS- (VERSIÓN 2010) Y SU APLICACIÓN EN EL DERECHO COLOMBIANO», 2010. P 21

[70] JOHN O. HONNOLD. "Uniform Law and Uniform Trade Terms - Two Approaches to a Common Goal", en HORN & SCHMITTHOFF (eds.), Transnational Law of International Commercial Transactions, Kluwer, 1982, pp. 170-171

[71] Código de Comercio de Colombia. Art 7.

[72] Uniform Commercial Code. Art 1-205

[73] UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (1980) [CISG]. Art 9.

[74] Prof. Dr. BURGHARD PILTZ (Gütersloh, Deutschland), INCOTERMS and the UN Convention on Contracts for the International Sale of Goods http://trans-lex.org/

"(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.
(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned."

Or the case of the Andean Community regulations. In this regulations we find a group of rules that obligate the parties to include an INCOTERM clause in their invoices. Thus, Andean Community Resolution 1112 of 2007, later modified by Resolution 1239 of 2009, establishes in its article 3rd[75] that the invoice must include the place and conditions of delivery of the goods.

Another case to consider is the decision of the ECJ in the Electrosteel case. In this case, it establishes new guidelines for national courts when determining the place of delivery of goods in international distance contracts[76]. This decision complements the previous decision in the Car Trim case and uses the INCOTERMS as a reference to interpret article 5.1.b) of Regulation 44/2001. These decisions represent a change in the ECJ's jurisprudence and a step towards the unification of substantive law in contract matters because from now on, courts should not resort to rules of private international law to determine the applicable law to the contract in order to delimit the place of delivery of goods. Instead, attention should be paid to the contract and all its clauses, including the INCOTERMS, and they should be considered when determining the place of delivery of goods.[77]

UCPs

UCPs, or Uniform Customs and Practice for Documentary Credits, are a set of rules that provide a standard framework for the issuance and use of letters of credit in international trade. They are widely recognized and used in international trade finance. However, their application has been

[75] Andean Community. Resolution 1239 of 2009. Art 3

[76] Bundesgerichtshof (Germany), JUDGMENT OF 25. 2. 2010 — CASE C-381/08
JUDGMENT OF THE COURT (Fourth Chamber) 25 February 2010, "Car Trim GmbH" Apdo. 20

[77] Vid. CARRASCOSA GONZÁLEZ, J., Ibid.

usually atached upon their incorporation into each individual contract, since the UCP does not form part of any treaty or international convention that is formally adopted by the states into their national legal system and thereby acquires the force of law only in the countries party to it.[78]

According to Article 1 of the UCP[79], its application to a contract is totally subordinate to the parties desires since as is said in this article, the text of the credit must indicate that it is subject to these rules. Nevertheless, despite the fact that the UCP's application is dependent on its incorporation into each individual contract, it is hard to find any letters of credit wherein the parties have expressly excluded even a single provision of the UCP from applying to their letter of credit.[80] This suggests that the UCP has acquired a dominant position as a letter of credit law.[81]

Most countries seem to have left the matter entirely to the UCP, and some have even declared the UCP to be a primary source of letter of credit law in their jurisdiction and have given it express pre-eminence over their domestic law. In the US, for instance, the drafters of Article 5 of the UCC - both the 1962 version and the revised 1996 version - never intended to compete with the UCP. They always attempted to avoid any possible conflict between the provisions and to make Article 5 of the UCC (both the 1962 and 1996 versions) consistent with and complementary to the UCP.[82]

Courts have widely recognized the fundamental concepts of the uniform customs underlying the letter of credit business, whether or not expressly invoked.[83] Even when not incorporated into

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[78] R. Goode, "Abstract Payment Undertakings and the Rules of the International Chamber of Commerce" (1995) 39 St. Louis U.L.J. 725 at 726.

[79] UCP 600 Art 1 provides that "[The UCP] . . . apply to any documentary credit . . . when the text of the credit expressly indicates that it is subject to these rules . . ."

[80] R.P. Buckley, "The 1993 Revision of the Uniform Customs and Practice for Documentary Credits" (1995) 28 Geo. Wash. J. Intl. L. & Econ. 265 at 266 (95% of the letters of credit incorporate the UCP as their choice of applicable rules).

[81] Schmitthoff, supra note 2 at 40.

[82] Mark Wayne, "The Uniform Customs and Practice as a Source of Documentary Credit Law in the United States, Canada and Great Britain: A Comparison of Application and Interpretation" (1990) 7 Ariz. J. Intl. & Comp. L 147 at 150

[83] King, supra note 4 at 8.

the credit, courts have applied the UCP's provisions to hold that an irrevocable letter of credit cannot be amended without the agreement of all parties and that the bank is under no obligation to comply with the request for an amendment made by the beneficiary and the applicant. The express incorporation of the UCP into the credit is irrelevant to the question of ascertaining the pertinent banking custom and usage.

For example, in 1978, in Belgium, the Tribunal de Commerce of Brussels held that the UCP was applicable, even without express agreement, to the relationship between the applicant of the credit and the bank because "il faut admettre aujourd'hui que ces regles ont valeur d'un v´eritable usage commercial."[84] Similarly, in the US, in AMF Head Sports Wear, Inc. v. Ray Scott's All-American Sports Club, Inc.[85], the court applied Article 3(c) of the UCP 1974 version[86], even when it was not incorporated into the credit, to hold that an irrevocable letter of credit could not be amended without the agreement of all parties thereto. The court rejected the contention of the plaintiff that the UCP should not be applied to the credit because it was not expressly incorporated into the agreement and further stated that it "does not memorize all banking customs."[87]

[84] As quoted in Schmitthoff, supra note 2 at 46. See also De Ly, supra note 50 at 178; C. Schmitthoff, Export Trade: The Law and Practice of International Trade, 9th ed. (Stevens & Sons, 1990) at 402.

[85] F.Supp. (D.C. Ariz., 1978).

[86] UCP 1974. Art 3(c) provides that “[Letter of credit] can neither be amended nor cancelled without the agreement of all the parties thereto”.

[87] AMF Head Sports, supra note 69.

Conclusions

International commercial transactions have become increasingly important in today's globalized economy, leading to the emergence of a body of international commercial law known as the lex mercatoria (LM). The LM must be understood within the context of transnational legal pluralism, which refers to the coexistence of multiple legal systems at different levels, including domestic legal systems, international law, and transnational law such as the LM.

Currently, there is no national or supranational regulation that explicitly establishes the obligation of national judges to apply the lex mercatoria. However, some theorists have speculated on the existence of mentions that would allow the direct application of the LM in documents such as the Inter-American Convention of 1994, article 7.2 of the United Nations Convention on Contracts for the International Sale of Goods (CISG) Principles on Choice of Law in International Commercial Contracts from the Hague Conference on Private International Law, which provide in Article 3.3 and there are some situations in which parties may choose to apply LM, such as when they opt for the LM as law applicable to their contract as it is mentioned in the Rome I Regulation (keeping in mind that this choice must not conflict with the mandatory provisions of the law of the country where the contract is performed).

But the lack of pronouncement of these mentions by national judges means that this debate remains unresolved.

The principles that govern these national judicial bodies, such as the principle of legal certainty, imply that the individual must have a reasonable certainty of the outcome of the trial, which can only be achieved if elements such as codification, transparency, and publicity of the judgments or coherence in rendering judgments without contradicting previous rulings are met. This is another reason why it is so difficult to use the lex mercatoria as applicable law by national or international judges.

Only with documents such as the UNIDROIT Principles, INCOTERMS, and UCPs can we find a middle ground between complying with the required guarantees and respecting the nature of the lex mercatoria. This has been seen in examples such as:

In 2010, the Constitutional Court of Colombia ruled in accordance with the UNIDROIT Principles. The case was a constitutional challenge against the first paragraph of article 1616 of the Civil Code of Colombia, where the Constitutional Court rejected the challenge. In doing so, the judges indicated that not only was the provision in question not irrational or arbitrary, but

they were also inspired by basic criteria of contractual justice and equity, and they pointed out their conformity with important international instruments such as the Vienna Convention in its article 74 and the UNIDROIT Principles in its article 7.4.4. (Guarín, 2015).

In the case of Colombian legislation and Andean Community regulations, we find a group of rules that obligate the parties to include an INCOTERM clause in their invoices. Thus, Andean Community Resolution 1112 of 2007, later modified by Resolution 1239 of 2009, establishes in its article 3rd that the invoice must include the place and conditions of delivery of the goods.

In the Electrosteel case, the ECJ established new guidelines for national courts when determining the place of delivery of goods in international distance contracts. This decision complements the previous decision in the Car Trim case and uses the INCOTERMS as a reference to interpret article 5.1.b) of Regulation 44/2001. These decisions represent a change in the ECJ's jurisprudence and a step towards the unification of substantive law in contract matters because from now on, courts should not resort to rules of private international law to determine the applicable law to the contract in order to delimit the place of delivery of goods. Instead, attention should be paid to the contract and all its clauses, including the INCOTERMS, and they should be considered when determining the place of delivery of goods.

About the UCPs, we have the example of the Tribunal de Commerce of Brussels and US courts, in AMF Head Sports Wear, Inc. v. Ray Scott's All-American Sports Club, Inc., the court applied Article 3(c) of the UCP 1974 version, even when it was not incorporated into the credit, to hold that an irrevocable letter of credit could not be amended without the agreement of all parties thereto. The court rejected the contention of the plaintiff that the UCP should not be applied to the credit because it was not expressly incorporated into the agreement and further stated that it "does not memorize all banking customs."

These documents, such as the UNIDROIT Principles, INCOTERMS, and UCPs, provide a common language on contract law, leading to spontaneous harmonization of law and international legal evolution, and contribute to the unification of international trade law without having to give up the advantages offered by the lex mercatoria as a regulatory system for international commerce.

So, we must conclude that, at least for the moment, the best way we have to apply the lex mercatoria is using documents such as the UNIDROIT Principles, INCOTERMS, and UCPs which provide a means to strike a balance between meeting the necessary guarantees and

respecting the nature of the lex mercatoria, as well as to the unification of international trade law and the evolution of the legal system.

Bibliography

Books

Acosta Estevez, Jose Benito. Organizaciones Internacionales y Relaciones Internacionales, s.d.

ALEJANDRO M. GARRO. "Rule-setting by private organizations, standardization of contracts, and the harmonization of international sales law", en IAN FLETCHER, LOUKAS MISTELIS, MARISE CREMONA (eds.). Foundations and Perspectives of International Trade Law, Londres, Sweet & Maxwell 2001.

BRITO, Maria Helena. "Portugal". In: ESPLUGUES MOTA, Carlos; HARGAIN, Daniel; PALAO MORENO, Guillermo (eds.). Derecho de los contratos internacionales en Latinoamérica, Portugal y España. Madrid: Edisofer, 2008.

BURGHARD PILTZ (Gütersloh, Deutschland), INCOTERMS and the UN Convention on Contracts for the International Sale of Goods http://trans-lex.org/

C. Schmitthoff, Export Trade: The Law and Practice of International Trade, 9th ed. (Stevens & Sons, 1990)

Calvo, L. A. & Carrascosa, J. (2006). Los contratos internacionales y el mito de la nueva lex mercatoria. Estudios sobre contratación internacional. Madrid: Colex.

CARLINI, Gabriel A. El contrato de compraventa internacional de mercaderías. Buenos Aires: Ábaco, 2010.

Cutler, C. "Legal Pluralism".

Dunning, John H. Multinational enterprises and the global economy. Harlow, England etc. : Addison-wesley, 1992.

FELDSTEIN DE CÁRDENAS, Sara L. (Coord. y autora). Derecho Internacional Privado. En: BUERES, Alberto (dir.). "Código Civil y Comercial de La Nación y normas complementarias. Análisis doctrinal y jurisprudencial", Buenos Aires, Hammurabi, En prensa. 2015..P 168-172.

Fouchard, Gaillard, Goldman "International Commercial Arbitration", P 244.

GOODE, Roy; KRONKE, Herbert; MCKENDRICK, Ewan. P. 06; 35; 38

Guarín, J. C. (2015). Principios UNIDROIT. Ratio Iuris, Revista de Derecho Privado, 3(1), 108-137.

Jaramillo, J. (1998). La lex mercatoria: mito o realidad. Negocios internacionales: tendencias, contratos e instrumentos. Tercer Congreso Iberoamericano de Derecho Empresarial. Bogotá.

JOHN O. HONNOLD. "Uniform Law and Uniform Trade Terms - Two Approaches to a Common Goal", en HORN & SCHMITTHOFF (eds.), Transnational Law of International Commercial Transactions, Kluwer, 1982.

Letto-Gillies, Grazia. Transnational corporations and international production: concepts, theories, and effects, 2005.

Marella, F. & Gélinas, F. (1999). The UNIDROIT principles of international commercial contracts in ICC arbitration. ICC, International Court of Arbitration Bulletin, 10(2), 26-119.

Mark Wayne, "The Uniform Customs and Practice as a Source of Documentary Credit Law in the United States, Canada and Great Britain: A Comparison of Application and Interpretation" (1990) 7 Ariz. J. Intl. & Comp. L 147 at 150

R. Goode, "Abstract Payment Undertakings and the Rules of the International Chamber of Commerce" (1995) 39 St. Louis U.L.J. 725 at 726.

R.P. Buckley, "The 1993 Revision of the Uniform Customs and Practice for Documentary Credits" (1995) 28 Geo. Wash. J. Intl. L. & Econ. 265 at 266 (95% of the letters of credit incorporate the UCP as their choice of applicable rules).

Schmitthoff, International Business Law: A New Law Merchant, Current Law and Social Problems, 1961, supra n 11, 5

Tai, Eric Tjong Tjin. "Global law for private law." Tilburg Law Review 17, no. 2 (2012).

Tamanaha, B. Z. "The rule of law".

Volger, Helmut, ed. «UNCITRAL – United Nations Commission On International Trade Law». En A Concise Encyclopedia of the United Nations, 692-96. Brill | Nijhoff, 2010. https://doi.org/10.1163/ej.9789004180048.i-962.595.

Articles

Brasil, i Frederico Glitz. «Lex Mercatoria: ¿Orden jurídico autónomo?». Centro Universitario de Curitiba, Brasil. Universidad Comunitaria de Chapecó (UNOCHAPECO), Rev. secr. Trib. perm. revis. 5, núm. 9 (26 abril 2017): 196-223. https://doi.org/10.16890/rstpr.a5.n9.p196

Bostan, Alexandru. «Transnational Law – a New System of Law?» *Juridical Tribune* 11, núm. special (30 octubre 2021). https://doi.org/10.24818/TBJ/2021/11/SP/05.

Cándano Pérez, Mabel. «La unificación del derecho comercial internacional: nueva lex mercatoria como alternativa al derecho estatal». Prolegómenos 21, núm. 41 (22 febrer 2018): 149-62. https://doi.org/10.18359/prole.3001.

CARDENA AFANADOR, Walter René. “Impacto en Colombia de la Lex mercatoria”. Revista electrónica de difusión de la Universidad Sergio Arboleda. 2006, nº 11, P 1-21.

Elósegui, Nerea Magallón. «NUEVAS PAUTAS DEL TJUE PARA LA IDENTIFICACIÓN DEL LUGAR DE ENTREGA DE LAS MERCANCÍAS EN LAS COMPRAVENTAS INTERNACIONALES A DISTANCIA». REVISTA ELECTRÓNICA DE ESTUDIOS INTERNACIONALES, 2012.

ESTEBAN DE LA ROSA, F., “Nuevos avances...”, loc.cit., p. Y DE MIGUEL ASENSIO, P.A., “La Sentencia del Tribunal de Justicia en el Asunto Car Trim”, at: http://pedrodemiguelasensio.blogspot.com/2010/03/la-sentencia-del-tribunal-de-justicia.html

F.Supp. (D.C. Ariz., 1978).

Fernández, Maximiliano Rodríguez. «LOS NUEVOS TÉRMINOS COMERCIALES INTERNACIONALES -INCOTERMS- (VERSIÓN 2010) Y SU APLICACIÓN EN EL DERECHO COLOMBIANO», 2010.

Oviedo, J. (2003). Aplicaciones de los principios de UNIDROIT a los contratos comerciales internacionales. Criterio Jurídico, 3, 7-33.

Pato, Alexia (2022). Derecho internacional privado II - Tema I: Métodos de reglamentación. Universidad de Girona (UdG)

Petsche, Markus. «The Application of Transnational Law (Lex Mercatoria) by Domestic Courts». Journal of Private International Law 10, núm. 3 (31 desembre 2014): 489-515. P 5. https://doi.org/10.5235/17441048.10.3.489.

PIRODDI, P., “Incoterms e luogo di consegna dei beni nel Regolamento Bruxelles I”, Riv. Dir.int.pri.pro., No 4, 2011. P 939-970.

Tang, Zheng Sophia. «Non-State Law in Party Autonomy â a European Perspective». *International Journal of Private Law* 5, núm. 1 (2012): 22. https://doi.org/10.1504/IJPL.2012.043899. P 7.

VÉSELA, ANDREEVA. «DERECHO INTERNACIONAL PRIVADO: OBJETO, CONCEPTO Y CONTENIDO DEL DIRPR», 2021.

Jurisprudence and legal references

1994 Inter-American Convention

AMF Head Sports

Andean Community. Resolution 1239 of 2009.

Bundesgerichtshof (Germany), JUDGMENT OF 25. 2. 2010 — CASE C-381/08 JUDGMENT OF THE COURT (Fourth Chamber) 25 February 2010, “Car Trim GmbH”

Código de Comercio de Colombia.

Colombia, ed. Código civil. 8. ed. Colección Códigos básicos. Bogotá: Legis, 2002. Art 1616

COMMUNICATION FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT ON EUROPEAN CONTRACT LAW. Brussels, 11.07.2001 COM(2001) 398 final

English Court of Appeal, Shamil Bank of Bahrain v Beximco Pharmaceuticals [2004]

ICC Guide on Transport and the Incoterms® 2010 Rules

Principles on Choice of Law in International Commercial Contracts.

Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations

STC 24/2004, 4-II-2004: «El legislador debe hacer el máximo esfuerzo posible en la definición de los tipos penales, promulgando normas concretas, precisas, claras e inteligibles» .

UCP 1974. Art 3(c) provides that “[Letter of credit] can neither be amended nor cancelled without the agreement of all the parties thereto”.

UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016

Uniform Customs and Practice for Documentary Credits (2007 Revision, ICC Publication No. 600).

UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (1980) [CISG].